

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.634 of 2018.
Confirmation Case No.10 of 2018.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Appellant: Muhammad Saleem through Syed Kausar Ali Bukhari, Advocate.

Respondent/State Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.

Date of hearing: 29.10.2019

Date of announcement: 05.11.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Muhammad Saleem son of Allah Ditta has preferred this appeal against the impugned judgment dated 31.10.2018 passed by the 1st Additional Sessions Judge, Malir, Karachi in Sessions Case No.176 of 2018, F.I.R. No.485/2017 u/s. 376 PPC registered at P.S. S.S.H.I.A, Karachi whereby the appellant Muhammad Saleem has been convicted and sentenced to death subject to confirmation by this court.

2. The brief facts of the prosecution case as per FIR are that complainant who is victim/eyewitness namely Mst. Sehar Fatima daughter of accused Muhammad Saleem son of Allah Ditta lodged the FIR, stating therein that she is resident at Wazir Brohi Goth, near Imam Bargah, Scheme No.33, Karachi along with her father and she is aged about 15/16 years and unmarried. About five years back her mother Shahnaz died due to serious illness. She has two minor brothers Muhammad Ali and Muhammad Moosa and other family members grand-mother namely Ashra Bibi and cousin Ahmed Nadeem. After death of her mother, her father Saleem was using the intoxication and her father was committing rape by force against her wish and will, with the result she became pregnant a year ago and gave birth to a baby of seven months and she was informed that she had again become pregnant and she mostly remained sick. On 15.10.2017, she went to the house of

Muhammad Aamir son of Muhammad Anwar Baig due to absence of her father at noon time, situated at Allah Wala Town Korangi Crossing, who was known to her mother, as her mother had worked as maid in his house where she disclosed the facts of pregnancy to wife of Muhammad Aamir Sahab, who brought her before lady doctor at Lyari where her abortion was effected with her will on 18.10.2017, thereafter the above facts were disclosed to media person, who was brought before the office at "Aaj ki Awaz" newspaper where Abdul Basit chief crime reporter, Raja Jawaid newspaper editor, who on her disclosure brought such facts in electronic and print media. Consequently the case was registered that her father had committed Zina with her since the last 4/5 years against her wish and will by force, hence this FIR.

3. The accused was arrested and after completion of usual investigation charge was framed against him to which he pleaded not guilty and claimed to be tried.

4. In order to prove its case the prosecution examined 05 PW's who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The appellant/accused recorded his statement under section 342 Cr.PC whereby he claimed his false implication by his daughter and that she was in fact a prostitute. He neither examined himself on oath nor produced any witness in his defence.

5. Learned 1st Additional Sessions Judge Malir, Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 31.10.2018, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and his daughter has falsely roped him into this false case to hide the fact that she has turned to prostitution; that apart from the evidence of his daughter there is no other evidence against him

and in effect it is his word against her word; that according to him the star witness who is the grandmother of the complainant who according to the complainant she told of her ordeal was not called as a PW and that there is no other corroborative or support material against him and as such he is entitled to be acquitted based on the benefit of the doubt. In support of his contentions he has placed reliance on **Mst Rehana Bibi V The State** (2018 YLR Note 100) and **Dil Jan V The State** (PLD 2019 Bal 92)

8. On the other hand Mr. Muhammad Iqbal Awan, Deputy Prosecutor General for State has fully supported the impugned judgment and has contended that in our society a daughter would never make such false allegations against her father; that the complainant's evidence is to be believed over that of accused as it can be seen that her evidence is reliable, credible and confidence inspiring and is corroborated by the medical evidence and as such the appeal should be dismissed. In support of his contention he placed reliance on **Shahzad alias Shaddu V State** (2002 SCMR 1009)

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

10. Before deciding this case we would reiterate our horror at the alleged offense which has been committed against the victim being one of incest and multiple rape by her father. However, as judges we must put aside our disgust and abhorrence at the alleged offense and decide the matter objectively without emotion and strictly in accordance with law keeping in view the golden principles of criminal law that the prosecution must prove its case against the accused beyond a reasonable doubt and that the accused is entitled to the benefit of the doubt. As was held in the case of **Tariq Pervez V The State** (1995 SCMR 1345) that if there is a **single circumstance**, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. Such principle was recently reiterated by the Supreme Court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

11. After our re assessment of the evidence on record we have come to

the conclusion that the prosecution has not proved its case against the accused beyond a reasonable doubt and that the accused is entitled to the benefit of that doubt for the following reasons:

- a) That there was an approximately 5 year delay in lodging the FIR. We can appreciate that under the circumstances it may have been extremely difficult to report the rape but to keep quiet for over 5 years in our view is really too long and may give rise to the complainant for whatever reason falsely implicating her father. His case being that he wanted her out of the way so that she could continue with her business of prostitution;
- b) That the medical evidence does **not** support the fact that the complainant was raped. No marks are found on her body to suggest that the accused forced himself upon her. If she had been consistently raped from the age of about 11 by an adult as alleged one would have expected to find some injury to her vagina or genitalia however there was none. Yes, she was no longer a virgin but there could have been numerous explanations for that a part from rape by her father. For instance, his defense in cross examination that she had turned to prostitution which even finds a mention in the medical notes.
- c) There was no DNA or semen match of her father.
- d) That the grandmother who she told of her ordeal and who could have corroborated her ordeal was not called as a PW in order to support her case because she was supporting the accused.
- e) Mrs. Aamir the lady she went to for help in order to arrange her abortion was not called as a PW to corroborate her case. Likewise the doctor who carried out her abortion. Thus, there is no corroborative evidence of any abortion or even of her first child which was apparently still born.
- f) That since the complainant was living in one room with two minor children it does not appeal to reason that she could have been so openly and frequently raped by her father in their presence. Since her mother died four or five years ago this would indicate that the minor's may well be as old as 8 or 9 who would not have kept quiet whilst such incident was taking place.
- g) The minor children aged then about 8 years plus were not called as witnesses to give evidence about the first pregnancy of the complainant who allegedly gave birth in the house or her second abortion or even rape. Perhaps at a minimum they could have given evidence about their sister's large stomach during those periods. Children by their nature are curious and would have noticed this and would have asked questions of the complainant especially if her stomach was larger.

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- h) No newspaper reporter or person from the media was examined and the newspaper cuttings have not been properly exhibited in accordance with the law
- i) The accused's confession before the police is of no evidentiary value and was later retracted by him.
- j) The police could have easily arranged independent witnesses from the locality when they searched the house and arrested the accused but they failed to do so in violation of S.103 Cr.PC

12. Thus, for the reasons mentioned above by extending the benefit of the doubt to the appellant he is acquitted of the Charge. The impugned judgment, conviction and sentence are set aside and the confirmation reference is answered in the negative. The accused shall be released unless wanted in any other custody case.

13. The appeal and confirmation reference is disposed of in the above terms.

MAK/PS